

ASUC Judicial Council

Direct Judgment

Yu vs. Loomba

On this date, the Twenty-fourth of April, Two Thousand and Twelve

By Senior Associate Justice Hinh Tran and Associate Justice Stephanie Chamberlain, with whom
Chair Erica Furer, and
Associate Justices Scott Lara, Suneeta Israni, and Ryan Mattison join

I. Introduction of the Arguments

In the case of *Yu vs. Loomba*, the Judicial Council is asked to consider the constitutionality of Executive Order #4, issued by A.S.U.C. President Vishalli Loomba on April 11th 2012, which voided the V.O.I.C.E. Initiative while allowing it to remain on the ballot.

The Plaintiff, Ms. Lynn Yu, campaign manager and representative for the V.O.I.C.E. Initiative, along with *amicus curiae* Senator Noah Ickowitz allege in their briefs that the defendant, President Vishalli Loomba, overstepped her authority by using an executive order to nullify an ongoing election. They hold that voiding an election appropriates a “very explicit function of the [Judicial] Council”¹ and that the order does “not meet the ‘urgent and necessary’ criteria”² set by the Constitution.

The Defendant, President Vishalli Loomba, and her spokesperson, Attorney General Deepti Rajendran, contend that Executive Order #4 was both urgent and necessary for the functioning of the ASUC for three reasons:

- 1) The impending threat of a lawsuit resulting from whistleblower reports
- 2) The lack of transparency on the part of the V.O.I.C.E. Initiative regarding the need for a Memorandum of Understanding (MOU)
- 3) The danger of the University of California’s Office of the President (UCOP) intervening in the affairs of the Association and enforcing upon it unfavorable policy interpretations.

The Defendant asserts that, as a result of these reasons, immediate action was required to restore the “functioning of the A.S.U.C.”³.

The Council must preface an examination of these arguments with a caveat; we were asked, in a charge sheet filed by Ms. Yu, to rule on the legality of President Loomba’s executive order itself, not the legality of the V.O.I.C.E. Initiative. As such, because we were not asked to rule on the legality of

¹ Title IV Article 17 Section 4 Clause 5 - Only the ASUC Judicial Council may void an election.

² Constitution Article II Section 2 Clause C - To direct by Executive Order the taking of actions which are urgent and necessary to maintain the functioning of the A.S.U.C. until the Senate can meet again. Any such Executive Order automatically expires at the third regular Senate meeting following issuance of the order, or upon termination by the Senate of the majority voting, a quorum being present to do business.

³ Ibid.

V.O.I.C.E., and insufficient evidence regarding that matter was heard at the April 18th hearing, our decision will in no way be construed as a validation or invalidation of V.O.I.C.E. We note that the Defendant has pledged, in the event of our overturning her executive order, to challenge the legality of the V.O.I.C.E. Initiative before this Council.

The Council examines the above arguments in detail below.

II. Authority and Jurisdiction of Executive Orders

The Constitution of the A.S.U.C. establishes the right of the President “to direct by Executive Order the taking of actions which are urgent and necessary to maintain the functioning of the A.S.U.C. until the Senate can again meet”⁴.

The Defendant, in her brief, notes that “there is no explicit definition of the word ‘function’...in any of the A.S.U.C. governing documents” and argues thus, “every role defined by the A.S.U.C. Constitution would constitute a ‘function’”⁵. According to President Loomba, these include “ensuring that all rules, regulations, and procedures passed by the Senate and/or stated in this Constitution are implemented and followed”⁶, “keeping the Senate informed of legal matters involving the Association”⁷, promoting the “welfare and interest of the students of the University of California at Berkeley”⁸, and ensuring “effective student participation in all areas of student concern”⁹.

Given the broad range of powers wielded by the Association, and the duties delegated to the President, the “functioning of the A.S.U.C.” can be broadly interpreted in order to allow the Association flexibility in dealing with extraordinary circumstances, such as the hypothetical earthquake referenced during the April 18th hearing.

However, an unlimited and unconstrained interpretation of executive authority can represent a distinct threat to the separation of powers enshrined within the Association’s Constitution. While the term “functioning” may be ambiguous, it does not serve as a blank cheque for executive authority and jurisdiction. Insofar as the V.O.I.C.E. Initiative, both the executive and legislative branches had multiple opportunities to conduct their due diligence, as explicitly delegated to them

⁴ Ibid.

⁵ Defendant Brief.

⁶ Constitution Article III Section 6 Clause A - Ensuring that all rules, regulations, and procedures passed by the Senate and/or stated in this Constitution are implemented and followed.

⁷ Constitution Article III Section 6 Clause E- Keeping the Senate informed of legal matters involving the Association.

⁸ Constitution Article III Section 1 Clause A - All legislative and final administrative authority of the Association shall be vested in and exercised by the ASUC Senate, for the promotion of the welfare and interest of the students of the University of California at Berkeley, subject to the limitations enumerated in this Constitution.

⁹ Constitution Preamble - We, the students of the Berkeley campus of the University of California, as an autonomous constituency of the university community, do provide by this Constitution a student government committed to effective student participation in all areas of student concern...

by the Constitution. In testimony admitted by the Council, the Initiative sought and received approval from, among others, the A.S.U.C. Senate, the Attorney General, the Constitutional and Procedural Review Committee, and the Chancellor or his/her designee. In addition, should a proposed initiative still prove unsatisfactory to the President, she may exercise her veto to deny it access to the ballot¹⁰.

However, once an initiative has been placed on the ballot and elections have commenced, the Constitution delegates sole authority and jurisdiction on this matter to the Judicial Council in order to preserve due process rights for all parties involved and to ensure the sanctity of the democratic process. In both the Constitution and the By-Laws, the language is clear, unambiguous, and explicit on this point^{11 12 13 14}.

This understanding of the Constitution is reinforced by an intuitive reading of the executive order clause¹⁵. The authority of the President to issue an Executive Order is premised on the Senate's temporary inability to act, and is subject later to Senate approval. Thus, the Constitution allows the President, in extraordinary circumstances, to act with the Senate's authority until the legislature is able to reconvene. It would be a vast overreach of executive and legislative authority, however, to interpret the executive order clause in such a way that enables them to consider and act on issues that are within the exclusive domain of the judiciary, and would seriously jeopardize the separation of powers enshrined within the Association.

III. Urgency of Executive Orders

Even if the President was empowered with jurisdiction over electoral matters, it must demonstrate that Executive Orders address issues which are both "urgent and necessary" for "the functioning of the A.S.U.C. until the Senate can meet again", whatever functions those may be.

The Defendant asserts several conditions fulfill the "urgency" criteria:

1) The fact that over 3,000 students had already voted on what the Defendant alleges to be an illegal, opaque initiative, and that, barring executive action, students would continue to do so

¹⁰ Constitution Article II Section 2 Clause B - To have the power of veto over legislative actions of the ASUC Senate.

¹¹ Constitution Article III Section 4 Clause C - To review charges of violation of this Constitution, the By-Laws of the Association, and all other regulations of the Association.

¹² Constitution Article VII Section 6 Clause C - All disputes/arbitration that arise are to handled solely by the Judicial Council.

¹³ Title IV Article XIII Section 1 - The ASUC Judicial Council shall have sole jurisdiction in all cases arising under these by-laws.

¹⁴ Title IV Article XVII Section 4 Clause 5 - Only the Judicial Council may void an election.

¹⁵ Constitution Article II Section 2 Clause C - See above.

- 2) “Nullifying an election retroactively would be ineffective because students would have already consented to a student fee, giving UCOP jurisdiction over policy interpretation”¹⁶
- 3) The Senate would not be able to act for at least another 8 days.

In evaluating each of these arguments, the Judicial Council is unconvinced that the situation was so urgent as to require an Executive Order. An examination of Executive Order #4’s imperative clause reveals that “the current ballot shall remain the same but the V.O.I.C.E. Initiative is void for the Spring 2012 A.S.U.C. election.” Even with the election for V.O.I.C.E. void, students still retained the ability to cast an informal ballot on the issue and to indicate their support of a student fee. Should this Council be asked to consider the legality of the V.O.I.C.E. Initiative in a future hearing, and decide to uphold its validity, the results may have already been irrevocably compromised and tainted by the intervention of a partisan official of the A.S.U.C. in the democratic process.

In addition, election By-Laws stipulate that tabulation of the ballots begins within the “24 hours following the good faith filing deadline for elections violations”¹⁷, which is “before 4 p.m. on the Tuesday following the close of polls”¹⁸. Following the release of “preliminary and uncertified results”, both the Elections Council and Judicial Council must certify the results before they become effective¹⁹. It is therefore legally impossible for UCOP to assert their interpretive jurisdiction over a ballot measure before its release, validation, and certification. Furthermore, as indicated by the timeline above, any student wishing to petition this Council regarding the validity of an election had ample time to do so before any results became confirmed.

Thus, it has not been demonstrated to the Council’s satisfaction that action by Executive Order#4 on April 11th 2012 mitigated any particular harm that had not already occurred, or that such harm could not have been prevented by alternative, and less disruptive actions.

Finally, while the Senate may have not been able to act on the matter, it is the opinion of this Council that this is an issue delegated solely and explicitly to the Judicial Council by the A.S.U.C. Constitution and its By-Laws.

IV. Necessity of Executive Orders

The defendant holds that an Executive Order was necessary for the following three reasons:

¹⁶ Defendant Brief

¹⁷ Title IV Article XV Section 1 Clause 1 - Preliminary ballot tabulation shall commence within 24 hours following the good faith filing deadline for elections violations...

¹⁸ JRP Article 3 Section 6 Clause 2.2.4.1 - Election violation cases are considered filed in good faith if they are originally filed before 4 p.m. on the Tuesday following the close of polls.

¹⁹ Title IV Article XV Section 1 Clause 5 - The election results...as certified by the Election Council, shall become effective...following their certification by the Judicial Council.

- 1) The referendum on the V.O.I.C.E. Initiative, which is alleged by the Defendant and *amici curiae* Senators Shahryar Abbasi and Justin Sayarath to have been not transparent in their dealings regarding the possibility of a MOU and possibly illegal fee levy, would have set a dangerous systemwide precedent for the Association and the UC Student Fee Referenda process
- 2) The possibility of legal action following the filing of whistleblower letters of grievance against the V.O.I.C.E. Initiative
- 3) Ceding the ability to negotiate a MOU regarding student fees to “a small group of students from an independent organization” would threaten the function of the ASUC by “forgoing the role of the Association”²⁰ in representing students and allow UCOP the ability to interpret policy on student fee referenda.

Without referring to the validity of the V.O.I.C.E. Initiative, the Judicial Council finds that Executive Order #4 has not met the conditions of necessity demanded by the Constitution. Necessity cannot be evaluated in a vacuum, that is, it must be judged against the possible alternatives at the President’s disposal. One such alternative, indeed the only one allowed by the Constitution and By-Laws of the Association, is to seek redress with the Judicial Council by filing a charge sheet. To prevent the harms the Defendant has detailed in her briefs, the President could have sought the issuance of an Emergency Preliminary Injunction to enjoin the Elections Council from tabulating or releasing the results of the election while the validity of the V.O.I.C.E. Initiative was settled as a matter of law. In effect, there was no material difference that could have been gained in the hours that passed between the issuance of Executive Order #4 and the filing of a thus moot charge sheet with the Judicial Council on April 11th 2012.

Indeed, President Loomba testified that she was aware she could have immediately pursued judicial relief, but decided to opt for executive action due to the late hour and the likelihood it would disturb members of the Judicial Council. We must note that, like her, we are servants of the Association and thus are willing and able to serve at the Association’s call. Inconvenience should not and cannot be justification for an Executive Order.

V. Conclusion and Decision

Based on the arguments evaluated above, it is the opinion of the Judicial Council that President Vishalli Loomba overstepped her authority by issuing Executive Order #4, which voided an ongoing election on the V.O.I.C.E. Initiative.

The A.S.U.C. Constitution clearly and explicitly delegates to the Judicial Council sole authority to resolve election disputes and to void elections. This separation of powers, particularly regarding elections, is to protect the due process rights of all parties involved and to ensure the sanctity of the democratic process. Given the partisan nature of the executive and legislative branches, it is

²⁰ Defendant Brief.

incumbent on the non-partisan and independent judiciary to maintain a vigilant guard against improper electoral interventions, no matter the intentions.

While the Council can imagine the burden placed on President Loomba following disclosure by Dean of Students and Assistant Vice-Chancellor for Student Affairs Jonathan Poullard that whistleblower complaints had been filed against the V.O.I.C.E. Initiative, and that a Memorandum of Understanding, with unknown consequences, would have to be negotiated between The Daily Californian and the University in the event that V.O.I.C.E. passes, we cannot find her executive action to be either urgent or necessary for the functioning of the Association.

The timeline established by the Constitution and the By-Laws allow sufficient time for any interested parties to challenge the validity of any election before the results are released, validated, and certified. In addition, the Defendant has been unable to show that executive action mitigated any harms that had already occurred or that it prevented further harm compared to less disruptive alternatives. As a result, there was no urgency for an Executive Order on April 11th 2011.

Given the availability and accessibility of judicial relief, the Council also finds Executive Order #4 to be unnecessary. Filing a charge sheet with the Judicial Council and asking for an injunction against the tabulation and release of election results would have allowed the legality of the V.O.I.C.E. Initiative to be settled without compromising the electoral process. Indeed, this action was pursued in the Class Pass Referendum.

Therefore, the Judicial Council hereby overturns Executive Order #4, on this date, the Twenty-fourth of April, Two Thousand and Twelve.

VI. Further Comment

On a separate note, the Judicial Council must also express grave concern at the failures of various Association officers, senators, and bodies to do their constitutionally mandated duties with due diligence. It was established as fact during the April 18th hearing that the Attorney General only attended 1/3 of the meetings of the Senate Constitutional and Procedural Review Committee²¹, and that said Attorney General, committee, and Senate voted to approve the language of the V.O.I.C.E. Initiative and to place it on the Spring 2012 ballot without discovering that a Memorandum of Understanding with possible unknown consequences would have to be negotiated in the event of passage of the V.O.I.C.E. Initiative. It is precisely because of this lapse that the Association and the V.O.I.C.E. Initiative is now in the process of litigation.

²¹ Title I Article IX Section 9 Clause 2 - The Attorney General shall attend all meetings of the Constitutional and Procedural Review Committee. The Attorney General shall work in conjunction with this Committee to ensure that all policies outlined in the ASUC Constitution and By-Laws are followed.

We must also indicate our extreme displeasure with Solicitor General Erin Delaney representing the Plaintiff. As an officer of the Association, she is tasked with representing the Association in legal action²², and to assist the Attorney General in her duties²³. Furthermore, she, in her official position, also provided both the Senate Constitutional and Procedural Review Committee and the Defendant, President Vishalli Loomba, with advice²⁴. That she is representing the plaintiff in an action against the Association, and the President, in particular, represents an egregious conflict of interest. Furthermore, despite prior notification by the Council about several procedural concerns, both Solicitor General Erin Delaney and former Attorney General Kevin Gibson failed to make adequate preparation for any possible consequences. However, given the extensive role she has played in working with Ms. Lynn Yu and the V.O.I.C.E. Referendum, and the possibility that the Plaintiff would be left without adequate representation, the Council was left with no other option but to recognize the Solicitor General as one of the Plaintiff's spokespersons. We note that Ms. Lynn Yu accepted this arrangement after the Council explained to her our possible concerns.

Chair Erica Furer

Senior Associate Justice Hinh Tran

Associate Justice Scott Lara

Associate Justice Suneeta Israni

Associate Justice Ryan Mattison

Associate Justice Stephanie Chamberlain

²² Title I Article IX Section 19 Clause 6 - The Solicitor General shall be the primary spokesperson of the ASUC if it is a plaintiff or defendant in any case.

²³ Title I Article IX Section 19 Clause 7 - The Solicitor General, when not working on a case, shall provide any assistance required by the Attorney General to accomplish his or her duties.

²⁴ Title I Article IX Section 19 Clause 5 - The Solicitor General shall keep updated with the business of the Senate and Executives of the ASUC.